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Who, What, Where, and When? Why Courts Should at Least Consider the Third Circuit's Heightened Ascertainability Requirement as a Prerequisite to Class Certification

Christian Osorno Cortes

Florida International University College of Law, Coso014@fiu.edu

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WHO, WHAT, WHERE, AND WHEN? WHY COURTS SHOULD AT LEAST CONSIDER THE THIRD CIRCUIT’S HEIGHTENED ASCERTAINABILITY REQUIREMENT AS A PREREQUISITE TO CLASS CERTIFICATION

*Christian Osorno Cortes**

ABSTRACT

In *Carrera v. Bayer Corp.*, the Third Circuit articulated a heightened requirement of ascertainability. This heightened level of ascertainability requires a plaintiff to define a class by objective criteria and demonstrate administratively feasible means to identify class members. Consistent with the Third Circuit’s view on ascertainability, such a requirement assures that the class includes only those injured and, therefore, eligible to receive a proper remedy. The requirement of heightened ascertainability would also protect defendants by ensuring them *res judicata* and allowing them to challenge the class’s membership. Yet, the Ninth Circuit’s opinion in *Briseno v. ConAgra Foods* stands in sharp contrast to the Third Circuit’s view on ascertainability; it holds that such a requirement is unnecessary and unsupported by the language of Federal Rule of Civil Procedure 23. This split has resulted in a divide among the circuit courts concerning the meaning and application of the implied requirement of ascertainability in determining a class’s certification suitability.

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I. INTRODUCTION

Enamored at first sight, Jeffrey Marcus leased a BMW in the summer of 2007 in New Jersey.¹ The car was equipped with specialty Bridgestone tires capable of running an additional 150 miles with completely deflated tires.² Marcus' vehicle suffered four flat tires during his three-year lease, and each time he returned to a BMW dealership to replace the damaged tires.³ Believing that BMW and Bridgestone had failed to disclose the defective nature of the specialty tires, Marcus sued both BMW and Bridgestone for breach of warranty of merchantability, asserting claims on behalf of a nationwide class and a New Jersey subclass.⁴ The district court certified the New Jersey subclass and used the class definition from Marcus' motion for class certification.⁵ The district court certified a class "consisting of [any] and [a]ll current and former owners and lessees of 2006, 2007, 2008, and 2009 BMW vehicles equipped with run-flat tires manufactured by Bridgestone . . . and sold or leased in [New Jersey] whose Tires have gone flat and been replaced"⁶

On appeal, the Third Circuit vacated the lower court's order granting certification.⁷ The Third Circuit found that the class definition adopted by the district court gave rise to serious ascertainability concerns.⁸ The court found that identifying all owners and lessees of BMW vehicles equipped with the specialty Bridgestone tires sold or leased from dealerships in New Jersey would prove to be an impossible task for several reasons.⁹ BMW had no feasible method of identifying the cars that fit the class definition because the cars were manufactured in different countries, and BMW had no records of

¹ Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 588 (3d Cir. 2012).

² *Id.*

³ *Id.*

⁴ *Id.* at 590.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 588.

⁸ *Id.* at 593.

⁹ *Id.*

the particular parts.¹⁰ Moreover, the class definition was not limited to those potential class members who took their vehicles to BMW dealerships to replace a Bridgestone tire that had gone flat.¹¹ Instead, the class definition broadly included all owners and lessees whose tires had gone flat and been replaced.¹² BMW further argued that no records existed that could identify the putative class members under Marcus' definition.¹³

The issues exhibited in *Marcus v. BMW of North America, LLC* demonstrate the general problems that the requirement of ascertainability seeks to resolve. Because Marcus' class raised serious ascertainability concerns, the district court would be unable to identify members that fall within the New Jersey subclass, depriving them of proper notice and a chance to receive an appropriate remedy. The court and the parties alike would be burdened with the seemingly enormous task of identifying cars and owners and lessees that fall within the class definition. Such administrative burdens would, in turn, place into question whether the class action mechanism was suitable to begin with.

Although not explicitly mentioned in the Federal Rules of Civil Procedure Rule 23, the implied requirement of ascertainability of a class serves a variety of important goals crucial to the class action mechanism.¹⁴ Some courts have recognized the necessity of ascertainability as a threshold issue considered before class certification.¹⁵ In recent years, courts have differed in applying the ascertainability requirement when considering whether to certify a class. The Third Circuit has stood out among the circuit courts for requiring a heightened level of ascertainability as a prerequisite to class certification.¹⁶ Like the Ninth Circuit, others have rejected the Third Circuit's view by holding that Rule 23 imposes no such requirement.¹⁷ This article explores the practicality of the Third Circuit's heightened

¹⁰ *Id.*

¹¹ *Id.* at 594.

¹² *See id.* at 590.

¹³ *Id.* at 594.

¹⁴ *See Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981) (holding that ascertainability helps determine the suitability of a class action lawsuit); *see also* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.21 [3][d] (2021) [hereinafter MOORE'S FEDERAL PRACTICE].

¹⁵ *See In re Petrobras Sec. Litig.*, 862 F.3d 250, 264 (2d Cir. 2017) ("Most [] circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that the members of a proposed class be readily identifiable, often characterized as an ascertainability requirement." (quoting *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (quotations marks omitted))).

¹⁶ *See, e.g., Marcus*, 687 F.3d at 583; *see also Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *Byrd v. Aaron's Inc.*, 784 F.3d 158 (3d Cir. 2015); *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434 (3d Cir. 2017).

¹⁷ *See, e.g., Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

ascertainability approach and the arguments in its favor. This article also analyzes the arguments against requiring heightened ascertainability and, in doing so, considers how courts and authors alike have mischaracterized the Third Circuit's requirement. Ultimately, this article recommends the application of a heightened ascertainability standard while recognizing that, in some respects, applying such a standard as a prerequisite to certification may be inappropriate and should be relaxed.

II. BACKGROUND

a. The World of Class Actions

A brief overview of class actions is necessary to understand the purpose and development of the ascertainability requirement. Federal Rule of Civil Procedure 23 provides the court's authority for certifying a class.¹⁸ "[T]he purpose of Rule 23 is to allow an efficient mechanism for disposing of multiple claims."¹⁹ The class action mechanism allows for multiple suits involving similar claims to be joined into a single action.²⁰ In doing so, class actions promote judicial economy and efficiency because they permit adjudication of multiple claims and prevent duplicative suits.²¹ The class action device allows individuals with similar claims to take part in class membership and obtain relief in situations where there are too many individuals, such that joining them would be impracticable.²² As Judge Posner stated, "[t]he device is especially important when each claim is too small to justify the expense of a separate suit, so that without a class action there would be no relief"²³ Defendants benefit from class actions because a judgment assures *res judicata* and protects them from litigating multiple claims and potentially inconsistent judgments.²⁴

The party seeking certification must satisfy the preliminary requirements under Rule 23(a) and (b).²⁵ Rule 23(a) lists four required characteristics of a class.²⁶ First, a class must be "so numerous that joinder of

¹⁸ See generally FED. R. CIV. P. 23.

¹⁹ *Simer*, 661 F.2d at 668 n.24.

²⁰ MOORE'S FEDERAL PRACTICE, *supra* note 14, at § 23.02.

²¹ *Id.*

²² *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014).

²³ *Id.*

²⁴ MOORE'S FEDERAL PRACTICE, *supra* note 14, at § 23.02.

²⁵ See FED. R. CIV. P. 23(a)–(b).

²⁶ *Id.* 23(a).

all members is impracticable.”²⁷ Second, questions of law and fact are common to the entire class.²⁸ Third, the claims and defenses of the class representative must be typical of the class’s claims and defenses.²⁹ Fourth, the class representatives must show they will fairly and adequately represent the interests of the class.³⁰ Having satisfied the requirements under Rule 23(a), a class must then fall within at least one of the three class types under Rule 23(b)(1)–(3). A class falls under Rule 23(b)(1) where a series of individual cases would pose a risk of inconsistent judgments or otherwise impair the class members’ interests.³¹ In a Rule 23(b)(2) class, the defendant’s act or refusal to act that caused the issue in controversy applies to the whole class, such that class-wide relief is appropriate.³² The last type of class, which falls under 23(b)(3), is one where common questions of law or fact predominate over any questions affecting individual class members, and the class action is superior to other methods of adjudicating the controversy.³³

The issue of notice under Rule 23(c)(2) is also important to ascertainability. In classes that fall within Rule 23(b)(1) or (b)(2), “the court may direct appropriate notice to” each class member. In Rule 23(b)(3) classes, putative class members may opt out of the class and thus will not be bound by the judgment.³⁴ The court must direct the best notice practicable to those “members who can be identified through reasonable effort.”³⁵

b. A Closer Look at Ascertainability

Although not an explicit requirement in Rule 23, the implied requirement of ascertainability primarily forms part of the inquiry into the sufficiency of a class’s definition. To whatever extent courts impose ascertainability as a requirement to certification, the rationale behind such analysis largely serves that same goal—to further the expediency and

²⁷ *Id.*

²⁸ *Id.*; see also *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011).

²⁹ FED. R. CIV. P. 23(a); see also *Dukes*, 564 U.S. at 345.

³⁰ FED. R. CIV. P. 23(a); see also *Dukes*, 564 U.S. at 345.

³¹ See MOORE’S FEDERAL PRACTICE, *supra* note 14, at § 23.40 [1]; see also FED R. CIV. P. 23(b)(1).

³² See MOORE’S FEDERAL PRACTICE, *supra* note 14, at § 23.40 [1]; see also FED R. CIV. P. 23(b)(2).

³³ See MOORE’S FEDERAL PRACTICE, *supra* note 14, at § 23.40 [1]; see also FED R. CIV. P. 23(b)(3). See, e.g., *Dukes*, 564 U.S. at 338.

³⁴ *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

³⁵ *Id.*

efficacy of the class action mechanism.³⁶ Although many courts have discussed the problems ascertainability seeks to resolve within the context of 23(b)(3) classes,³⁷ such problems are not limited to one form of class. Rather, many of these problems are common to all forms of classes because they relate to the sufficiency of the class as a whole.³⁸ Since the definition of a class affects the adequacy of the class action mechanism, class definitional issues have profound implications. Issues with class definition affect whether absent class members receive notice and the relief they are entitled to.³⁹ Such issues also affect defendants' protection from duplicitious litigation by ensuring finality.⁴⁰

Courts and commentators alike dispute the application of ascertainability, specifically, the point at which to undertake an ascertainability analysis before certification and how stringent to impose the implied Rule.⁴¹ At the center of these discussions is the question of what extent the varying views of ascertainability help further these goals. A study of the circuit courts reveals two prevailing perspectives on ascertainability: a class defined by objective criteria,⁴² or one defined by objective criteria *and*

³⁶ A readily ascertainable class furthers the efficiency of the class action mechanism. *See* Daniel Luks, *Ascertainability in the Third Circuit: Name That Class Member*, 82 FORDHAM L. REV. 2359, 2370 (2014) ("Focusing on ascertainability at an early stage allows courts to directly confront problems facing class certification rather than attempting to solve the issues using the traditional Rule 23(a) analysis."). An efficient class action mechanism, in turn, promotes administrative and judicial efficiency. *See* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 1:9 (5th ed. 2020) [hereinafter NEWBERG ON CLASS ACTIONS].

³⁷ *See, e.g.*, Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015); Karhu v. Vital Pharm., Inc., 621 F. App'x 945, 950 (11th Cir. 2015); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 535 (6th Cir. 2012).

³⁸ *Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981) (noting that, while manageability is explicitly relevant in 23(b)(3) classes, concerns in managing a class are still relevant to (b)(1) and (b)(2) classes because they relate to "identifying a class, cost of notice of settlement, and administrative burdens on the court in managing the litigation.").

³⁹ *Cf.* NEWBERG ON CLASS ACTIONS, *supra* note 36, § 3:1 ("A definable class protects absent plaintiffs in two ways—by enabling notice to be provided where necessary and by defining who is entitled to relief . . .").

⁴⁰ *Cf. id.* ("[A] definable class protects defendants by enabling a final judgment that clearly identifies who is bound by it.").

⁴¹ *See, e.g.*, Christine P. Bartholomew, *The Failed Superiority Experiment*, 69 VAND. L. REV. 1295, 1307–08 (2016); *see also* Stephanie Haas, *Class Is in Session: The Third Circuit Heightens Ascertainability with Rigor in Carrera v. Bayer Corp.*, 59 VILL. L. REV. 793, 804 (2014) ("courts have not consistently defined [ascertainability]."); Ransome R. Hare, *Class Action Law—The Growing Split on the Heightened Test for Ascertainability in Class Certification—Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017), 40 AM. J. TRIAL ADVOC. 615, 617 (2017) ("the Third Circuit's new administrative feasibility test for ascertainability has spurred significant debate amongst scholars and judges over the past few years.").

⁴² *See, e.g.*, EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) ("A class cannot be certified unless a court can readily identify the class members in reference to objective criteria."); *see also*

administratively feasible methods.⁴³ For clarity purposes, this article will refer to ascertainability that requires solely objective criteria as “objective ascertainability.” This article will refer to ascertainability that requires both objective criteria and administrative feasibility as “heightened ascertainability.” While the parameters of ascertainability are unclear, courts in both camps generally agree that objective criteria are the starting point to a suitable class definition.⁴⁴ Nonetheless, determining the ascertainability of a class, using one method or the other, helps assure the “fair conduct of [class] actions.”⁴⁵

Courts inconsistently undertake an ascertainability analysis at different stages before a class’s certification.⁴⁶ Indeed, some courts have applied ascertainability as part of the analysis under Rule 23(a).⁴⁷ In other circumstances, courts have discussed ascertainability concerns in relation to the requirements under the various forms of 23(b) classes.⁴⁸ Regardless of when its application occurs, class ascertainability serves to safeguard both the class members and defendants. As alluded to previously, a readily

McKeage v. TMBC, LLC, 847 F.3d 992, 998 (8th Cir. 2017) (“A class may be ascertainable when its members may be identified by reference to objective criteria”); Elliott v. ITT Corp., 150 F.R.D. 569, 574 (N.D. Ill. 1992) (“An identifiable class exists if its members can be ascertained by reference to objective criteria . . .”).

⁴³ See, e.g., Byrd v. Aaron’s Inc., 784 F.3d 154, 163 (3d Cir. 2015); see also Astrazeneca AB v. UFCW (*In re* Nexium Antitrust Litig.), 777 F.3d 9, 19 (1st Cir. 2015); Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537–538 (6th Cir. 2012); Karhu v. Vital Pharms., Inc., 621 F. App’x 945, 946 (11th Cir. 2015).

⁴⁴ Hare, *supra* note 41, at 615 (“Technical definitions of ascertainability vary across jurisdictions, and some courts even refrain from using the term altogether, but in short, an ascertainable class is typically described as one where class members can be promptly identified simply by referencing the objective criteria in the class definition.”).

⁴⁵ See FED. R. CIV. P. 23 advisory committee’s note.

⁴⁶ See NEWBERG ON CLASS ACTIONS, *supra* note 36, § 3:2 (“many courts that utilize a definiteness test simply state that it is an essential part of the class certification standard without pointing to a specific section of the Rule that makes it so.”); see also *id.* at § 3:3 (“courts address the issue of definiteness ‘at an early practicable time.’”).

⁴⁷ See, e.g., *id.* at § 3:3; Richey v. Matanuska-Susitna Borough, No. 3:14-CV-00170 JWS, 2015 WL 1542546, at *2 n.14 (D. Alaska Apr. 7, 2015) (“[D]efiniteness is an ‘essential’ element of class certification, that it is implied in Rule 23(a) . . .” (quoting NEWBERG ON CLASS ACTIONS § 3:2)); see also Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349, 359 (3d Cir. 2013) (refusing to determine whether class satisfies predominance requirement under 23(b)(3) “since ascertaining the class is logically antecedent to determining whether issues common to the class predominate over individual issues . . .”).

⁴⁸ See, e.g., *In re* Monumental Life Ins. Co., 365 F.3d 408, 413 (5th Cir. 2004) (noting that Rule 23(b)(2) class must be sufficiently defined where notice and opt-out rights are requested); Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 592–93 (3d Cir. 2012) (“Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria.”). But see Shelton v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015) (noting that ascertainability is not a prerequisite to certification for Rule 23(b)(2) classes).

ascertainable class helps determine the suitability of the class action.⁴⁹ An adequately defined class ensures the validity of the class's claim, thereby preventing a defendant from capsizing under the pressure of settling due to the certification of an ascertainable class.⁵⁰ For absent class members, specifically in Rule 23(b)(3) actions, ascertainability protects their interest "by facilitating the best notice practicable under Rule 23(c)(2)."⁵¹

Even where a class's definition satisfies the baseline objective ascertainability, problems with a class's definition still arise. A heightened ascertainability analysis may help resolve these issues. In some cases, a class's definition may include putative members whose determination of whether they fall within the class lies on the ultimate question of liability.⁵² These classes are called "fail-safe" classes. The Sixth Circuit, for example, affirmed a district court's decertification of a class whose definition included only individuals who were "entitled to relief."⁵³ In such circumstances, the putative class members would qualify as members only if the class succeeded; conversely, an adverse judgment would mean that those same members are not in the class.⁵⁴ Thus, "fail-safe classes [are] one category of classes [that] fail[] to satisfy the ascertainability requirement."⁵⁵ Such classes inherently preclude a class definition sufficient from indeed constituting an ascertainable class because its members cannot be identified neither "by reference to objective criteria,"⁵⁶ nor can "[t]he analysis of objective criteria . . . be administratively feasible."⁵⁷ Some classes may be defined in terms that render them over-inclusive because the members therein do not constitute

⁴⁹ See *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981); see MOORE'S FEDERAL PRACTICE, *supra* note 14, § 23.21 [3][d].

⁵⁰ See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001) ("Recognizing that denying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . .").

⁵¹ *Marcus*, 687 F.3d at 593; see also *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016) ("ascertainability is a requirement tied almost exclusively to the practical need to notify absent class members and to allow those members a chance to opt-out and avoid the potential collateral estoppel effects of a final judgment.").

⁵² See *In re Rodriguez*, 695 F.3d 360, 369–70 (5th Cir. 2012).

⁵³ *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011).

⁵⁴ *Id.*

⁵⁵ Erin L. Geller, *The Fail-Safe Class as an Independent Bar to Class Certification*, 81 FORDHAM L. REV. 2769, 2782 (2013).

⁵⁶ *Fogarazzo v. Lehman Bros.*, 263 F.R.D. 90, 97 (S.D.N.Y. 2009) (quoting *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 395 (S.D.N.Y. 2008)).

⁵⁷ *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014) (citation omitted).

injured persons.⁵⁸ Therefore, these members lack standing to sue.⁵⁹ The Third Circuit briefly touched on this subject in *City Select v. BMW*.⁶⁰ Though, it noted that, generally, a high degree of over-inclusiveness is required to prevent certification.⁶¹ At least in part, the imposition of a clear level of ascertainability could preclude such issues from arriving.⁶² Therefore, the requirement of ascertainability could help “defin[e] a class so as to avoid, on one hand, being over-inclusive and, on the other hand, the fail-safe problem. . . .”⁶³

c. The Circuit Courts’ Caselaw on Ascertainability

With a general understanding of class actions and ascertainability, analyzing the circuit courts’ differing views on ascertainability is now proper. This section will explain the Third Circuit’s jurisprudence on the requirement of heightened ascertainability. Case law of other circuit courts that agree is also noted. The second part of this section will analyze the differing interpretations of the ascertainability requirement, primarily the Ninth Circuit’s opinion in *Briseno v. ConAgra Foods*,⁶⁴ followed by sister circuits’ opinions that fall in line with the Ninth’s.

i. The Third Circuit’s Requirement of Heightened Ascertainability.

The Third Circuit first articulated a heightened requirement of ascertainability in *Marcus v. BMW of North America, LLC* to underscore its applicability by highlighting the deficiency of Marcus’ class definition.⁶⁵ As discussed in the introduction, Marcus brought a class action lawsuit, on behalf of a nationwide class and a New Jersey subclass, against BMW and Bridgestone for breach of warranty of merchantability.⁶⁶ Marcus asserted that

⁵⁸ See *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 442 n.4 (3d Cir. 2017).

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ *Id.* (“While a high degree of over-inclusiveness could prevent certification, any degree of over-inclusiveness will not do so.”).

⁶² See, e.g., *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (“Either problem can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis.”).

⁶³ See *id.*

⁶⁴ *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

⁶⁵ *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012).

⁶⁶ *Id.* at 590.

both BMW and Bridgestone failed to disclose the defective nature of specialty tires designed to run while flat after Marcus leased a BMW and suffered four flat tires throughout his lease.⁶⁷ On appeal, the Third Circuit cited ascertainability, *inter alia*, as a concern that prevented class certification.⁶⁸ The court observed, “[a] class must be readily ascertainable based on objective criteria [i]f class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”⁶⁹ Without explicitly stating so, the court articulated a requirement that administratively feasible means must exist to render a class sufficiently ascertainable and, thus, avoid individualized fact-finding or mini-trials. The court also recognized three important objectives that ascertainability serves: (i) eliminating administrative burdens related to class actions; (ii) protecting absent class members by providing the “best notice practicable” under Rule 23(c)(2); and (iii) safeguarding defendants by ensuring that individuals who the judgment will bind are identifiable.⁷⁰ Marcus’ class definition did not meet the Third Circuit’s requirement of ascertainability because BMW lacked any records or feasible methods by which it could identify cars or putative class members that fell within the class definition.⁷¹ Consequently, the inadequacy of the class’s definition would hinder the purposes that ascertainability sought to serve.

In 2013, the Third Circuit decided *Hayes v. Wal-Mart Stores*, where it discussed in further detail its heightened requirement of ascertainability.⁷² In that case, plaintiff Hayes brought a class action lawsuit against Wal-Mart, alleging a violation of the New Jersey Consumer Fraud Act, after he purchased a service plan for products not covered under the plan.⁷³ The court granted Hayes’ motion for class certification at trial, finding that the class was ascertainable because objective criteria defined it.⁷⁴ The class was defined as:

All consumers who, from January 26, 2004[,] to the present, purchased from Sam’s Clubs in the State of New Jersey, a Sam’s Club Service Plan to cover as-is products. Excluded from the Class are consumers whose as-is product was covered by a full manufacturer’s warranty, was a last-one

⁶⁷ *Id.* at 588.

⁶⁸ *Id.* at 593.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.*

⁷¹ *Id.* at 593–94.

⁷² *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013).

⁷³ *Id.* at 353.

⁷⁴ *Id.*

item, consumers who obtained service on their product, and consumers who have previously been reimbursed for the cost of the Service Plan.⁷⁵

However, because the trial court granted certification prior to the decision in *Marcus*, it did not have the benefit of the Third Circuit's discussion regarding the heightened requirement of ascertainability.⁷⁶ Consequently, the trial court did not consider whether the plaintiff met his burden of demonstrating whether administratively feasible methods of determining the class members existed.⁷⁷ In outlining the proper procedure for the trial court, the Third Circuit further explained that a "plaintiff must show by a preponderance of the evidence that there is a reliable *and administratively feasible method for ascertaining the class*."⁷⁸ Moreover, a court must conduct a rigorous analysis to determine whether the plaintiff has met his burden of proof in satisfying the prerequisites of Rule 23.⁷⁹

In *Carrera v. Bayer Corp.*, perhaps the Third Circuit's most controversial case, Gabriel Carrera sought certification of a Florida subclass containing individuals who purchased a weight-loss supplement sold by Bayer Corporation.⁸⁰ Particularly at issue, in this case, was Carrera's proposed method to ascertain the class members: (i) online records of sales made with loyalty cards, and (ii) affidavits from putative class members indicating they purchased the supplement.⁸¹ The court ultimately held that these methods were inadequate to satisfy the requirement that administratively feasible methods exist to prove class membership.⁸² For one, the online records would only demonstrate putative class members who purchased the supplement through loyalty cards; however, only one retailer that sold the product offered loyalty cards.⁸³ Ascertaining the class using loyalty cards would thus be insufficient to identify class members.⁸⁴ The

⁷⁵ *Id.*

⁷⁶ *Id.* at 352.

⁷⁷ *Id.* at 356.

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.* at 354; *see also In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008) ("A party's assurance to the court that it intends or plans to meet the requirements [of Rule 23] is insufficient.").

⁸⁰ *Carrera v. Bayer Corp.*, 727 F.3d 300, 304 (3d Cir. 2013).

⁸¹ *Id.*

⁸² *Id.* at 308–09.

⁸³ *Id.*

⁸⁴ *Id.* at 308.

court, however, did not categorically rule out retailer records as an acceptable method of ascertaining a class.⁸⁵

Second, the court held that the self-proving affidavits, absent any validating evidence, could foster fraudulent or inaccurate claims.⁸⁶ Such a method implicated both the class members and the defendant's due process. Without a measure to test the validity of claims, members who are genuinely entitled to relief would receive less than they should.⁸⁷ Next, just as the defendant has a due process right to raise individual challenges and defenses against a plaintiff's claim, so too does the defendant have a right to challenge the validity of the class's membership.⁸⁸ Indeed, Bayer had no method to test whether putative class members who submitted an affidavit actually purchased the weight loss supplement.⁸⁹ Such an enormous task would compel the court to conduct intensive fact-finding inquiries or mini-trials.

Byrd v. Aaron's Inc. and *City Select Auto Sales, Inc. v. BMW Bank of North America, Inc.* provided the opportunity for the Third Circuit to clarify its precedent on ascertainability further.⁹⁰ *Byrd* and *City Select* are similar in that, in both cases, the trial courts erred in applying the Third Circuit's precedent. In *Byrd*, the trial court confused the requirement of ascertainability with the question of whether the "named Plaintiffs [were] members of the class."⁹¹ The court clarified that prior to the certification stage, a plaintiff need not conclusively prove the membership of each and every class member.⁹² Rather, the plaintiff must establish administratively feasible means by which to identify class members. Ultimately, the proposed classes satisfied the ascertainability requirement because the plaintiffs put forward objective records that could be used to identify class members fully.⁹³

In *City Select*, the Third Circuit vacated and remanded the district court's denial of class certification for two reasons.⁹⁴ First, the district court

⁸⁵ *Id.* ("Depending on the facts of a case, retailer records may be a perfectly acceptable method of proving class membership.").

⁸⁶ *Id.* at 309–10.

⁸⁷ *Id.* at 310.

⁸⁸ *Id.* at 307.

⁸⁹ *Id.* ("Ascertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership.").

⁹⁰ *Byrd v. Aaron's Inc.*, 784 F.3d 154 (3d Cir. 2015); *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434 (3d Cir. 2017).

⁹¹ *Byrd*, 784 F.3d at 166.

⁹² *Id.* at 167 ("The ascertainability standard is neither designed nor intended to force all potential plaintiffs who may have been harmed . . . by a particular defendant to be included in the class in order for the class to be certified.").

⁹³ *Id.* at 169.

⁹⁴ *City Select*, 867 F.3d at 436.

held that the defendant's database, in conjunction with affidavits from putative class members, was not a reliable and administratively feasible method to determine the class's members.⁹⁵ As in *Bryd*, the Third Circuit again clarified:

Plaintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership. Rule 23 does not require an objective way of determining class membership at the certification stage, but only that there be "objective criteria" for class membership and a "reliable and administratively feasible" means of determining whether these criteria are met.⁹⁶

Thus, the district court's conclusion that affidavits, in conjunction with the defendant's records, categorically fail to meet the ascertainability standard was erroneous. In fact, "[a]ffidavits, in combination with records or other reliable and administratively feasible means, can meet the ascertainability standard."⁹⁷

ii. The First and Fourth Circuits Agree with the Third Circuit

The First Circuit adopted the Third Circuit's heightened ascertainability requirement in *In re Nexium Antitrust Litigation*.⁹⁸ In that case, the plaintiffs brought suit against generic and non-generic drug manufacturers, asserting a violation of antitrust and consumer protection laws when the drug manufacturers unlawfully manipulated and overcharged drug prices.⁹⁹ The district court certified a class of third-party payors, such as union health and welfare funds, that reimburse their members for prescription drugs and individual members.¹⁰⁰ The First Circuit reasoned that, prior to certification, trial courts should ensure an administratively feasible method of identifying class members so as not to render the class action mechanism procedurally unfair.¹⁰¹ Quoting to the Third Circuit's opinion in *Carrera*, the court indicated that, "[trial courts] may proceed with certification so long as this mechanism [to distinguish uninjured versus injured class members] will be

⁹⁵ *Id.* at 441.

⁹⁶ *Id.* (citation omitted).

⁹⁷ *Id.*

⁹⁸ *Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9 (1st Cir. 2015).

⁹⁹ *Id.* at 13–14.

¹⁰⁰ *Id.* at 14.

¹⁰¹ *Id.* at 19–20.

‘administratively feasible’”¹⁰² On appeal, the drug manufacturers argued that no methods existed to identify and distinguish class members who used generic and non-generic versions of a drug sold by the defendants, respectively.¹⁰³ The First Circuit took a more proactive stance, observing that while the plaintiffs had not proposed such a method to identify the members, the plaintiffs could nonetheless establish appropriate mechanisms to do so.¹⁰⁴ Moreover, the defendants merely speculated as to the absence of methods by which to identify putative class members.¹⁰⁵

Although the First Circuit adopted the heightened ascertainability standard as set out in *Carrera*, the court observed that, in the context of antitrust cases, establishing an injury through a rebuttable presumption similar to the presumption of reliance in securities class actions may be an appropriate method.¹⁰⁶ Second, if unrebutted testimony of a consumer in an individual antitrust case was sufficient to establish injury, then it follows that the unrebutted testimony in the form of affidavits or declarations in antitrust class actions could satisfy the “administratively feasible” requirement as well.¹⁰⁷ These methods would presumably follow traditional evidentiary burdens concerning rebuttable presumptions, where the presumption stated will stand as fact unless otherwise contested.¹⁰⁸

In *EQT Production Co. v. Adair*, the Fourth Circuit reversed a district court’s decision certifying five classes in a consolidated case, holding that the lower court failed to analyze the administrative burdens associated with identifying class members rigorously.¹⁰⁹ In Virginia, natural gas producers extracting coalbed methane gas (“CBM”) from pooled gas estates made royalty payments to persons who owned a gas estate.¹¹⁰ Where defendants EQT Production Co. and CNX Gas Co., natural gas producers, identified persons as having a CBM ownership conflict, the producers created an escrow account to hold the royalties connected with the disputed land

¹⁰² *Id.* at 19.

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 20–21.

¹⁰⁵ *Id.* at 21.

¹⁰⁶ *Id.* at 20. However, the court abstained from deciding the question. (“We do not decide whether applying such a presumption would be appropriate.”).

¹⁰⁷ *Id.* (“There cannot be a more stringent burden of proof in class actions than in individual actions. ‘Rigorous analysis’ of Rule 23 requirements does not require raising the bar for plaintiffs higher than they would have to meet in individual suits.” (citation omitted)).

¹⁰⁸ See generally Kenneth W. Graham, Jr., *Effect of Presumptions; Presumed Fact*, 21B FED. PRAC. & PROC. EVID. § 5126 (2d ed. 2020).

¹⁰⁹ *EQT Prod. Co. v. Adair*, 764 F.3d 347, 352 (4th Cir. 2014).

¹¹⁰ *Id.* at 353 (A person who owns a gas estate owns the subsurface gas rights in a tract of land).

interest.¹¹¹ Out of five total classes, four classes alleged EQT and CNX deprived the class members of royalty payments from the production of CBM.¹¹² Class members were defined to include “all persons, and their successors-in-interest, who EQT or CNX identified . . . as being owners of a gas estate”¹¹³

Emphasizing the avoidance of administrative burdens stemming from identifying class membership, the Fourth Circuit recognized the implicit requirement that a proposed class be “readily identifiable.”¹¹⁴ The court stated of the ascertainability requirement: “However phrased, the requirement is the same. A class cannot be certified unless a court can readily identify the class members in reference to objective criteria.”¹¹⁵ In defining the classes to include both former and current gas estate owners, the class definition provided “little conception of the nature of the proposed classes or who may be bound by a potential merits ruling” because it failed to account for changes in gas estate ownership over the years.¹¹⁶ Paying members their royalties required verifying ownership.¹¹⁷ Ownership issues did not merely affect the class members’ royalty payments but also the ascertainability of the classes’ membership.¹¹⁸ As defined, the court could not hold the classes sufficiently ascertainable to satisfy Rule 23’s requirements.¹¹⁹

iii. The Ninth, Second, Sixth, Seventh, Eighth, and Eleventh
Circuits’ Denial of Heightened Ascertainability

For the most part, the circuit courts seemingly agree that a class defined by objective criteria meets a threshold level of ascertainability. The Third Circuit’s second requirement to ascertainability, namely, the “administratively feasible” prong of the analysis, is at issue among the courts.¹²⁰

¹¹¹ *Id.* at 354.

¹¹² *Id.* at 355.

¹¹³ *Id.* at 359.

¹¹⁴ *Id.* at 358.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 359–60.

¹¹⁷ *Id.* at 359.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 360.

¹²⁰ See generally *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017); see also *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015); *In re Petrobras Sec. Litig.*, 862 F.3d 250 (2d Cir. 2017); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016).

The Ninth Circuit expressly tackled the issue of whether the plaintiff class was required to demonstrate an administratively feasible means to identify class members in *Briseno v. ConAgra Foods*.¹²¹ Plaintiff Briseno sought certification of a class consisting of individuals across eleven states that purchased cooking oil from defendant ConAgra.¹²² The district court certified the class, finding sufficient objective criteria to define the class.¹²³ ConAgra appealed, arguing that Briseno offered no administratively feasible means of defining the class members.¹²⁴ The court first looked to the language of Rule 23 and argued that a plain reading of the Rule does not mention “administrative feasibility.”¹²⁵ Assuming that the omission of such a requirement was purposeful, the Ninth Circuit declined to interpose an additional step explicitly absent from Rule 23.¹²⁶

The court also indicated, for example, that such further requirement would render manageability requirement under Rule 23(b)(3) superfluous.¹²⁷ In connection to this, the court argued that imposing a heightened level of ascertainability was unnecessary, in part, because the manageability standard under Rule 23(b)(3) already served the purposes of the ascertainability requirement; i.e., to further the expediency and efficacy of the class action mechanism.¹²⁸ The Ninth Circuit went on to hold that using ascertainability to further the best practicable notice to absent class members under Rule 23(c)(2) was unfounded because the Rule does not contemplate notice to all class members.¹²⁹ Finally, administrative feasibility in ascertaining a class is unnecessary in the context of due process concerns for a defendant to raise challenges and defenses to claims because “[d]efendants can oppose the class representatives’ showings at every stage.”¹³⁰ Moreover, the issue of self-serving affidavits should pose no concerns because, in an individual lawsuit, such evidence could force liability on the defendant without offending the due process clause.¹³¹ For these reasons, the Ninth Circuit refused to follow the Third Circuit’s heightened ascertainability precedent.

¹²¹ See *Briseno*, 844 F.3d at 1121.

¹²² *Id.* at 1123–24.

¹²³ *Id.* at 1124.

¹²⁴ *Id.* at 1125.

¹²⁵ *Id.*

¹²⁶ *Id.* at 1126.

¹²⁷ *Id.*

¹²⁸ See *id.* at 1127–28.

¹²⁹ *Id.* at 1129 (“[t]he rule does not insist on actual notice to all class members in all cases” and “recognizes it might be impossible to identify some class members for purposes of actual notice.” (quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir. 2015))).

¹³⁰ *Id.* at 1130–31.

¹³¹ *Id.* at 1132.

The Second Circuit found that ascertainability does not require that a plaintiff show administratively feasible means of identifying class members, only that a class be defined using objective criteria. In *In Re Petrobras Securities Litigation*, the court held that its precedent and the language of Rule 23 indicated no support for an administrative feasibility requirement.¹³² In that case, the plaintiffs, shareholders of the defendant oil company, Petrobras, brought a class action against the company for violations under the Exchange Act and the Securities Act.¹³³ Affirming the district court's certification of the class, the Second Circuit observed that the administrative feasibility requirement encroached on the enumerated requirements of Rule 23(b)(3).¹³⁴ The duplicative nature of the heightened requirement rendered it unnecessary.¹³⁵ Instead, the court held that the ascertainability requirement only necessitated the modest requirement that objective criteria define the class.¹³⁶

Similar to the Ninth Circuit, the Sixth Circuit declined to follow the Third Circuit's *Carrera* decision in *Rikos v. P&G*, distinguishing its approach to what satisfies the ascertainability requirement by contrasting the factual differences between *Carrera* and the case before the court.¹³⁷ In *Rikos*, three individuals who purchased a nutritional supplement sued its maker, Proctor & Gamble ("P&G").¹³⁸ Class members were composed of all consumers who purchased the supplement from March 1, 2009.¹³⁹ P&G argued that class ascertainability would be impossible because most consumers did not purchase directly from P&G.¹⁴⁰ Rather, consumers purchased the product through online and in-person commercial retailers.¹⁴¹

The circuit court provided that the ascertainability requirement is satisfied if the plaintiffs produce sufficient evidence to "show that the class is ascertainable."¹⁴² The court reasoned the plaintiffs satisfied their burden because the district court could determine class membership with reasonable accuracy by reviewing internal P&G data and supplementing its review through the use of "receipts, affidavits, and a special master to review

¹³² *In re Petrobras Sec. Litig.*, 862 F.3d 250, 264–65 (2d Cir. 2017).

¹³³ *Id.* at 258–59.

¹³⁴ *Id.* at 268.

¹³⁵ *See id.*

¹³⁶ *Id.* at 269.

¹³⁷ *See generally* *Rikos v. P&G*, 799 F.3d 497 (6th Cir. 2015).

¹³⁸ *Id.* at 502.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 524.

¹⁴¹ *Id.*

¹⁴² *Id.* at 525.

individual claims.”¹⁴³ Moreover, while *Carrera*’s proposed class membership could not be sufficiently ascertainable under the methods provided by the plaintiff, the plaintiffs’ proposed methods could feasibly verify customers belonging to the class, and therefore satisfied the ascertainability requirement.¹⁴⁴ Factually then, the plaintiffs’ proposed methods of ascertaining a class would, in any event, satisfy the administrative feasibility prong of heightened ascertainability.

The Seventh Circuit directly considered in *Mullins v. Direct Digital, LLC* “whether Rule 23(b)(3) imposes a heightened ‘ascertainability’ requirement as the Third Circuit . . . have held”¹⁴⁵ in *Carrera*. On behalf of a nationwide class, Plaintiff Mullins sued defendant Direct Digital, asserting that Direct Digital had fraudulently misrepresented that its product relieved joint pain.¹⁴⁶ Direct Digital argued that the district court erred in certifying the class because Mullins had not provided administratively feasible methods to identify the class.¹⁴⁷ The Seventh Circuit affirmed the district court’s order.¹⁴⁸ The court’s determinations served as the basis for many of the Ninth Circuit’s holding. Both courts found the heightened ascertainability requirement incompatible with the plain language of Rule 23.¹⁴⁹ The courts also held that a heightened level of ascertainability is futile to alleviating administrative concerns because other explicit parts of the Rule better address these burdens.¹⁵⁰ The last determination that the two circuits shared is that the Third Circuit’s ascertainability requirement does not necessarily further the notice requirement under Rule 23(c)(2) because the Rule does not require actual notice to every class member.¹⁵¹

The Seventh Circuit’s opinion in *Mullins* differs slightly from the Ninth Circuit’s opinion in *Briseno* in that it primarily focuses more on the heightened ascertainability requirement’s effect on negative value consumer

¹⁴³ *Id.* at 526.

¹⁴⁴ *Id.* at 525–26.

¹⁴⁵ *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

¹⁴⁶ *Id.* at 658.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 657.

¹⁴⁹ See *Mullins*, 795 F.3d at 658 (“Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3)”); see also *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017) (“[The Rule] does not mention ‘administrative feasibility.’”).

¹⁵⁰ See *Mullins*, 795 F.3d at 663 (“This concern about administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3)”); see also *Briseno*, 844 F.3d at 1127 (“We likewise conclude that Rule 23’s enumerated criteria already address the interests that motivated the Third Circuit”).

¹⁵¹ See *Briseno*, 844 F.3d at 1129 (“[t]he rule does not insist on actual notice to all class members in all cases” and “recognizes it might be impossible to identify some class members for purposes of actual notice.” (quoting *Mullins*, 795 F.3d at 665)).

class actions. Because it is more likely that potential class members do not keep documentary proof of purchase, and likewise that defendants may not have records identifying consumers who have purchased specific products, requiring a showing of administratively feasible means to ascertain the class would effectively bar low-value class actions.¹⁵² As the last point, the Seventh Circuit disagreed with the Third Circuit's determination that self-serving affidavits, by themselves, could not satisfy any level of ascertainability.¹⁵³ The court noted the efficacy of self-serving affidavits in individual lawsuits and subsequently held that there was no reason why this form of evidence would be insufficient in the class action lawsuit.¹⁵⁴

The Eighth Circuit does not fall within either camp of the implied requirement of ascertainability. As the court indicated in *Sandusky Wellness Center, LLC v. Medtox Scientific, Inc.*:

This court, unlike most other courts of appeals, has not outlined a requirement of ascertainability. "It is elementary that in order to maintain a class action, the class sought to be represented must be adequately defined and clearly ascertainable [T]his court has not addressed ascertainability as a separate, preliminary requirement. Rather, this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class "must be adequately defined and clearly ascertainable."¹⁵⁵

The Eighth Circuit noted the disagreement among the circuit courts concerning the meaning of ascertainability and its application,¹⁵⁶ Indeed, the court took the unorthodox approach of relying only on the enumerated requirements of Rule 23 to determine the sufficiency of a class's definition.¹⁵⁷

The Eleventh Circuit appeared to have adopted the Third Circuit's heightened ascertainability requirement in an unpublished decision from 2015, *Karhu v. Vital Pharm.*¹⁵⁸ There, the court stated: "A plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and *that*

¹⁵² See *Mullins*, 795 F.3d at 662.

¹⁵³ *Id.* at 669.

¹⁵⁴ *Id.*

¹⁵⁵ *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (citations and quotation marks omitted).

¹⁵⁶ See *id.* at 995–96.

¹⁵⁷ *Id.* at 996.

¹⁵⁸ See generally *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945 (11th Cir. 2015).

identification will be administratively feasible."¹⁵⁹ However, in a recent decision, *Cherry v. Dometic Corp.*, the court disregarded *Karhu* and held that "[p]roof of administrative feasibility cannot be a precondition for certification."¹⁶⁰ In that case, owners of refrigerators manufactured by Dometic Corporation sued the company and alleged that a defect was widespread among Dometic's refrigerators.¹⁶¹ The proposed class consisted of purchasers of certain Dometic refrigerators in various states since 1997.¹⁶²

The Eleventh Circuit did not analyze whether the plaintiffs provided sufficient evidence establishing a class's ascertainability; instead, the court focused its inquiry on determining "whether either circuit precedent or the text of Rule 23 establishes administrative feasibility as a requirement for class certification."¹⁶³ Noting that circuit precedent did not mandate proof of administrative feasibility, the court held that a class is ascertainable where courts may determine its membership is capable of being determined.¹⁶⁴ Furthermore, the court held that administrative feasibility did not follow from the text of Rule 23 because it did not bear upon Rule 23(a)'s enumerated requirements.¹⁶⁵ And, although administrative feasibility may be relevant in light of Rule 23(b)(3)'s manageability requirement, Rule 23(b)(3)'s balancing test precludes imposing administrative feasibility as a requirement.¹⁶⁶ Among a court's consideration of numerous factors, therefore, administrative burdens related to identifying class members would be insufficient to prevent certification.¹⁶⁷

III. ANALYSIS

Having outlined and categorized the circuit courts' views on ascertainability into two different camps—those that side with the Third Circuit and those that side with the Ninth Circuit—this article now addresses some concerns and mischaracterizations of the Third Circuit's heightened ascertainability requirement. Ultimately, this article recommends courts consider the "administratively feasible" requirement articulated by the Third

¹⁵⁹ *Id.* at 948 (emphasis added).

¹⁶⁰ *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021).

¹⁶¹ *Id.* at 1299–1300.

¹⁶² *Id.* at 1300.

¹⁶³ *Id.* at 1302.

¹⁶⁴ *Id.* at 1303.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1303–04.

¹⁶⁷ *Id.* at 1304.

Circuit.¹⁶⁸ Notwithstanding concerns the circuit courts have raised against it, a heightened level of ascertainability serves several practical purposes, such as ensuring class members receive proper notice and relief and protecting the defendant from duplicitous litigation. However, its application need not be as rigid as some courts allude it to be. Perhaps a court does not need to consider the heightened ascertainability requirement as a freestanding, hardline requirement. But at the very least, courts should consider it as a factor where appropriate.

a. Benefits of Heightened Ascertainability

At bottom, Rule 23 serves to save resources and increase expediency because it allows for adjudication of similar claims simultaneously.¹⁶⁹ In the context of determining whether both the explicit and implied requirements of Rule 23 are met prior to certification, heightened ascertainability could serve as a reassurance that such requirements have been affirmatively met. Merely because a heightened ascertainability requirement may factor into other enumerated considerations of Rule 23 does not render the Rule unnecessary, duplicative, or superfluous. Indeed, the explicit requirements of Rule 23 often work in tandem with each other: one may factor into the analysis of the other and vice versa.¹⁷⁰ For example, under Rule 23(b)(3), the number of potential individual issues is relevant not only for determining whether common questions predominate over such issues but also for a class's manageability.¹⁷¹

Thus, unlike the Ninth, Seventh, Second, and Eighth Circuits' view that the imposition of administrative feasibility would take effect away from Rule 23's enumerated requirements, the prerequisite would serve to advance the explicit requirements. For instance, for purposes of manageability, if a plaintiff demonstrates administratively feasible means to identify members forming a nationwide class, then, before certification, a court could determine whether class members live in different states and thus, whether the court

¹⁶⁸ Although the Third Circuit imposes heightened ascertainability in Rule 23(b)(3) classes, the concerns it seeks to resolve may still be relevant in other forms of classes. Therefore, heightened ascertainability need not be limited to such classes.

¹⁶⁹ See *Simer v. Rios*, 661 F.2d 655, 668 n.24 (7th Cir. 1981).

¹⁷⁰ Even the Supreme Court has recognized the merging of the requirements of Rule 23 in some instances and made no mention that such an occurrence rendered one or the other requirement superfluous. *Cf. Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) ("The commonality and typicality requirements of Rule 23(a) tend to merge. . . . Those requirements therefore also tend to merge with the adequacy-of-representation requirement.").

¹⁷¹ MOORE'S FEDERAL PRACTICE, *supra* note 14, at § 23.46 [2][e][i].

will encounter an issue with having to apply state-law claims.¹⁷² Depending on the circumstances surrounding the case, the heightened ascertainability requirement would help a court determine the class's manageability. And while unmanageability on its own should not preclude certification, a heightened level of ascertainability could provide a court with enough reassurance to move it from mere speculation of unmanageability to certainty.¹⁷³ The effect and purpose of the enumerated requirements in Rule 23 remain, and the requirement heightened ascertainability would merely underscore them.

Logically then, because "it is not at all clear that the problems in managing a class are not relevant in certifying (b)(1) and (b)(2) class actions," since "[s]ome of the problems which arise in all subdivisions of Rule 23(b) are common to all forms of class action identifying a class, cost of notice settlement, and administrative burdens on the court in managing litigation,"¹⁷⁴ then heightened ascertainability would likewise help to remediate these problems. To demonstrate further, suppose that a plaintiff puts forward objective criteria for defining the class. The defendant presents evidence disputing such criteria and their validity. The district court must now undertake rigorous analysis to resolve this dispute because it is relevant to determining whether the plaintiff satisfied Rule 23's requirements.¹⁷⁵ Assume that the plaintiff provided evidence demonstrating administratively feasible means of determining class membership—such as the defendant's records in addition to self-serving affidavits. With this evidence, the court can expeditiously resolve the dispute and certify the class because it does not have to undertake fact-intensive inquiries and mini-trials to determine membership. The defendant may dispute the methods as failing to constitute administratively feasible means to identify the class. Still, the plaintiff's proffer of records *and* self-serving affidavits to ascertain the class is all that is required. Recall the Third Circuit's reasoning in *City Select*:

Plaintiff need not, at the class certification stage, demonstrate that a single record, or set of records, conclusively establishes class membership. Rule 23 does not require an objective way of determining class membership at the certification stage, but only that there be "objective

¹⁷² See *id.*

¹⁷³ See *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 671 (7th Cir. 2015); see also MOORE'S FEDERAL PRACTICE, *supra* note 14, at § 23.46 [2][e][ii].

¹⁷⁴ *Simer*, 661 F.2d at 668 n.24.

¹⁷⁵ See *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) ("[A] district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.").

criteria” for class membership and a “reliable and administratively feasible” means of determining whether these criteria are met.¹⁷⁶

Thus, requiring objective criteria to define a class in conjunction with administratively feasible means to determine the same serves to further judicial expediency and efficacy.

b. Rightful Criticism

The Seventh Circuit focused its analysis more so on self-serving affidavits’ sufficiency to readily identify class members, particularly in negative value consumer class actions.¹⁷⁷ To categorically bar affidavits as evidence to ascertain the class, as the Third Circuit did, is misguided when considered in the context of consumer class actions. In such cases, a defendant manufacturer may be more inclined to purge itself of records to weaken the sufficiency of the class’s definition and, in turn, undermine the adequacy of the class action mechanism. The Seventh Circuit was correct in its view that potential class members rarely retain documentary proof of purchase, thus creating a significant obstacle to certification.¹⁷⁸ Putative class members who suffered an injury would have little to no viable option to seek a proper remedy because their claim is minuscule. Thus, particularly in negative value consumer class actions, courts should exercise more flexibility concerning these evidentiary issues in determining the ascertainability of a class.

As the First Circuit explains, “[r]igorous analysis . . . of Rule 23 requirements does not require raising the bar for plaintiffs higher than they would have to meet in individual suit.”¹⁷⁹ Indeed, the First Circuit articulated what may be a proper approach:

[One] approach would be to establish injury through testimony by the consumer that, given the choice, he or she would have purchased the generic. Such testimony, if

¹⁷⁶ *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 441 (3d Cir. 2017) (emphasis added) (citing to *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015)).

¹⁷⁷ *See Mullins*, 795 F.3d at 669.

¹⁷⁸ *See id.* at 662.

¹⁷⁹ *See Astrazeneca AB v. UFCW (In re Nexium Antitrust Litig.)*, 777 F.3d 9, 20 (1st Cir. 2015) (citing to *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982)); *see also* *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1132 (9th Cir. 2017) (“Given that a consumer’s affidavit could force a liability determination at trial without offending the Due Process Clause, we see no reason to refuse class certification simply because that same consumer will present her affidavit in a claims administration process after a liability determination has already been made.”).

unrebutted, would be sufficient to establish injury in an individual action. And if such consumer testimony would be sufficient to establish injury in an individual suit, it follows that similar testimony in the form of an affidavit or declaration would be sufficient in a class action.¹⁸⁰

Therefore, following the regular evidentiary burdens that each party has, the burden of production falls with the plaintiff to put forward evidence demonstrating administratively feasible methods to determine class membership. The burden then shifts to the defendants to rebut the evidence. A defendant cannot merely speculate as to the validity of the plaintiff's evidence. Therefore, a failure on the part of the defendant would mean the plaintiff prevails on the issue of administrative feasibility.¹⁸¹

To clarify, however, the relaxed application to the heightened ascertainability requirement should apply only to negative consumer class action cases. Otherwise, self-serving affidavits may be used in conjunction with additional documentary evidence to satisfy ascertainability.

c. Addressing Some Mischaracterizations and Concerns

The Ninth Circuit took a narrow view of Rule 23's language to determine that the omission of an explicit administrative feasibility requirement was an indication that the Rule did not support the requirement.¹⁸² Thus, using this reasoning, the implied requirement that objective criteria define a class would also be unsupported by the plain language of the Rule. Yet, the Ninth Circuit did not attempt to correct the district court, which certified the class in *Briseno* using the objective criteria standard.¹⁸³ In that case, the court indicated that the district found "sufficient [for ascertainability purposes] that the class was defined by an objective criterion."¹⁸⁴ The Ninth Circuit's determination focused solely on the administrative feasibility standard as articulated by the Third Circuit. Nowhere in its opinion did the Ninth Circuit hold that the ascertainability standard of defining a class by objective criteria was unsupported by the plain language of the Rule—only that the Rule did not mention administrative

¹⁸⁰ *In re Nexium Antitrust Litig.*, 777 F.3d at 20.

¹⁸¹ *See, e.g., id.* at 20 ("Such testimony, if unrebutted, would be sufficient to establish injury in an individual action. And if such consumer testimony would be sufficient to establish injury in an individual suit, it follows that similar testimony in the form of an affidavit or declaration would be sufficient in a class action.").

¹⁸² *See Briseno*, 844 F.3d at 1125.

¹⁸³ *See id.* at 1124.

¹⁸⁴ *Id.*

ascertainability.¹⁸⁵ For the same reasons articulated in Section III.a, *supra*, a heightened level of ascertainability would help alleviate administrative burdens.

Some courts in the Ninth Circuit continue to apply an ascertainability standard, albeit in a less stringent form.¹⁸⁶ One court has even recognized that, despite the Ninth Circuit's decision in *Briseno*, "the [court] has suggested that a class must nonetheless be ascertainable if it is to be certified."¹⁸⁷ Another court found a class's definition satisfied the ascertainability standard where the class definition "set forth objective characteristics sufficient to enable prospective class members to identify themselves."¹⁸⁸ And, yet another, explicitly stated, "[a]scertainability requires that the class definition be 'definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member' before trial, and by reference to 'objective criteria.'"¹⁸⁹ Surely then, any requirement of ascertainability, no matter how stringent, would be impermissible to apply in determining a class's sufficiency if courts followed the Ninth Circuit's logic in refusing to apply an implied requirement unsupported by the language of Rule 23. However, courts' continuing practice in applying an ascertainability standard supports the argument that Rule 23 compels its application because it remedies problems common to a class seeking certification, notwithstanding its omission from the Rule's language.

The language of Rule 23 requiring the "best practicable" notice should not conflict with the purposes of ascertainability, as the Ninth and Seventh

¹⁸⁵ See generally *id.*

¹⁸⁶ See, e.g., *Senne v. Kan. City Royals Baseball Corp.*, No. 14-cv-00608-JCS, 2017 U.S. Dist. LEXIS 32949, at *141 n.8 (N.D. Cal. Mar. 7, 2017) (noting that the main concerns with respect to ascertainability are still relevant to the typicality requirement under 23(a)(3) and the superiority requirement under 23(b)(3)), *aff'd in part and reversed in part on other grounds*, 2019 U.S. App. LEXIS 24459 (9th Cir. Cal., Aug. 16, 2019); see also *Brooks v. Darling Int'l, Inc.*, No. 1:14-cv-01128-DAD-EPG, 2017 U.S. Dist. LEXIS 49660, at *16 (E.D. Cal. Mar. 30, 2017) (discussing ascertainability concerns with respect to the class's Rule 23(a)'s requirements of commonality, typicality, and adequacy, and the requirements under Rule 23(b)(3) of predominance and superiority); *Spacone v. Sanford, L.P.*, No. 2:17-CV-02419-AB-MRW, 2018 U.S. Dist. LEXIS 153916, at *17 (C.D. Cal. Aug. 9, 2018) ("A class certification requirement not included in Rule 23 is ascertainability, a prudential standard that requires courts to find whether it is administratively feasible to ascertain whether individuals are members of proposed classes.").

¹⁸⁷ *Brooks*, 2017 U.S. Dist. LEXIS 49660, at *16; see also *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071, n.4 (9th Cir. 2014); *Pierce v. County of Orange*, 526 F.3d 1190, 1200 (9th Cir. 2008); *Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x. 803, 804 (9th Cir. 2014).

¹⁸⁸ *Feller v. Transamerica Life Ins. Co.*, No. 2:16-cv-01378-CAS-AJW, 2017 U.S. Dist. LEXIS 206822, at *45 (C.D. Cal. Dec. 11, 2017).

¹⁸⁹ *Heredia v. Eddie Bauer LLC*, No. 16-cv-06236-BLF, 2018 U.S. Dist. LEXIS 4747, at *14 (N.D. Cal. Jan. 10, 2018) (citing *Daniel F. v. Blue Shield of Cal.*, 305 F.R.D. 115, 122 (N.D. Cal. 2014)).

Circuits hold. Nowhere in the Third Circuit's precedent does the court indicate that heightened ascertainability imposes more than Rule 23 requires, particularly concerning notice.¹⁹⁰ Indeed, the rationale behind an ascertainable class and the notice provisions in Rule 23 does not contemplate that each class member *must* receive notice. Instead, they work in tandem with each other to ensure that "best practicable" notice is fulfilled by being able to identify "[i]ndividual class members who can be identified through reasonable effort."¹⁹¹ The underlying purpose of this language parallels the purpose of ascertainability—that there be objective criteria to identify members and that there be administratively feasible means to test the criteria. Therefore, it follows that a class in which most members are readily ascertainable—because membership is defined by objective criteria and may be determined by administratively feasible means—would also constitute a class where reasonable efforts help identify the class members. While it may be the court's responsibility to provide notice, it should do so without the burden of having to conduct extensive work to find out who the class members are.

The Ninth Circuit dismissed the rationale that heightened ascertainability protected the due process rights of the defendant to raise challenges and defenses to claims because a defendant could challenge a plaintiff's claims "at every stage."¹⁹² However, this premise ignores the reality that a defendant almost certainly has more interest in challenging the class's sufficiency before certification because certification is often considered a watershed moment in a case, which may place incredible pressure on a defendant to settle, even if the claim is nonmeritorious.¹⁹³ It is important to note that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and *a class action cannot be certified in a way that eviscerates this right or masks individual issues.*"¹⁹⁴ Removing such protection, merely because a defendant can challenge a plaintiff's claims at every stage, would nonetheless partially implicate a defendant's due process rights. Indeed, a defendant would be one step closer to having no choice but to settle if the class was certified.

¹⁹⁰ See *City Select Auto Sales, Inc. v. BMW Bank of N. Am., Inc.*, 867 F.3d 434, 439 (3d Cir. 2017). Administrative feasibility does not require that a plaintiff identify all class members prior to certification. It would be illogical then for the same standard to require notice to every class member.

¹⁹¹ FED. R. CIV. P. 23(c)(2).

¹⁹² See *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1130–31 (9th Cir. 2017).

¹⁹³ See *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001) ("[D]enying or granting class certification is often the defining moment in class actions (for it may sound the 'death knell' of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . .").

¹⁹⁴ *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (emphasis added).

IV. CONCLUSION

Courts apply the implied requirement of ascertainability when determining the sufficiency of a class's definition. Whether a class is adequately defined has profound implications on the class action mechanism because it may very well determine how the case is tried. Though courts diverge on its meaning, the prevailing view of the circuit courts is that, at base, an ascertainability requirement helps remedy serious administrative burdens on both courts and the parties. A heightened ascertainability requirement, as articulated by the Third Circuit, requires a plaintiff to define the class by objective criteria and demonstrate that administratively feasible means exist to identify the class's membership. Such a requirement reaffirms the class action mechanism's suitability and ensures that both plaintiffs and defendants are protected. For plaintiffs, the heightened ascertainability requirement allows potential class members to receive proper notice and ensures an adequate remedy to those who genuinely deserve it. For defendants, the heightened ascertainability requirement protects their due process right to raise challenges against the class and thereby test its adequacy. Lastly, the requirement promotes judicial efficiency because it prevents courts from engaging in individualized fact-finding or mini-trials to determine class membership. For these reasons, courts should consider the Third Circuit's heightened ascertainability requirement in determining whether the prerequisites of class certification are satisfied.